statement and conduct unbecoming an officer. He was sentenced to pay a fine of $500.00 for two months and to be reprimanded. A timely Art. 69 review was filed. The Judge Advocate General set aside the conviction for false swearing on December 13, 2004. On March 3, 2005, the Judge Advocate General issued a mandate directing that a supplemental convening authority's action be issued. On 28 April, 2005, the convening authority issued his supplemental action. The petitioner filed a petition for extraordinary relief in the nature of a writ of mandamus and a petition for review under Art. 69(D) on 27 July 2005. The petition was denied on 18 August 2005. A timely writ appeal was filed in the Court of Appeals of the Armed Forces on 6 September 2005. The writ appeal was denied on 12 December 2005.

A Navy Board of Inquiry found based on the court-martial conviction, that LT House had committed misconduct but recommended that he be retained. Since his promotion to Lieutenant Commander was revoked, however, LT House was forced to retire from the Navy prematurely and in disgrace.

REASONS FOR GRANTING THE PETITION

I M.R.E. 707 is Unconstitutional When an Accused Seeks to Admit Polygraph Evidence Under the *Daubert* Standard

The constitutionality of M.R.E. 707 is an important point of law that needs to be addressed by this Court. It is time for the Court to revisit their ruling in *United States v. Scheffer*, 523 U.S. 303, (1998). In *Scheffer*, the Court found that M.R.E. 707 was constitutional. Notably the *Scheffer* court made their decision based on the now discredited reasoning in *Frye v. United States*, 54 App.

D.C. 46, 293 F. 1013 (1923). The petitioner believes that it is time to reconsider *Scheffer* for three reasons. The *Frye* standard has been rejected by the Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993), the adoption of M.R.E. 707 was not in consonance with Art. 36(a) of the U.C.M.J., and the technological advances in the field of polygraphy since *Scheffer* require another review of the validity of the evidence.

Although *Frye*'s general approach to scientific evidence probably required the rejection of the polygraph that existed at the time of *Scheffer*, many federal courts have rejected the view that all polygraph evidence should be categorically inadmissible. *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989); *United States v. Posado*, 57 F.3d 428, 434 (5th Cir. 1995). Well reasoned opinions are concluding, consistent with the Court's decisions in *Daubert, supra*, and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), that the rules allow federal judges to exercise broad discretion when evaluating the admissibility of scientific evidence." *United States v. Cordoba*, 104 F.3d 225, 227 (9th Cir. 1997). Since *Scheffer*, that reasoning has been expanded to include all expert testimony. *Khumo Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999). Those opinions correctly observe that the rules of evidence generally recognized in the trial of civil and criminal cases in the federal courts do not contain any blanket prohibition against the admissibility of polygraph evidence. In accord with the modern trend the Court of Military Appeals held that an accused was "entitled to attempt to lay" the foundation for admission of favorable polygraph evidence. *United States v. Gipson*, 24 M.J. 246, 253 (1987). The President responded to *Gipson* by adopting M.R.E. 707.

In *Scheffer*, this Court upheld a rule of evidence that made evidence resulting from a polygraph

examination *per se* inadmissible. In doing so, the Court rejected the military court system's second attempt at shedding its *per se* rule excluding polygraph evidence. *See Scheffer* at 323 (Stevens, J., dissenting). The *Scheffer* decision actually applied the overruled *Frye* standard for admission of expert evidence while barely acknowledging the current two pronged test of its landmark decision *Daubert*. It also disregarded the liberal approach of admissibility taken by the Federal Rules of Evidence. The holding of the *Scheffer* Court not only denies petitioner's constitutionally guaranteed rights, but also ignores the sentiment and thrust of both the Federal Rules and *Daubert*. The Court, in *Daubert*, held that the *Frye* test had been superceded by the adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 588. The Miliary Rules of Evidence are based upon the Federal Rules of Evidence.

Ultimately, the *Scheffer* opinion does not provide definitive answers to the issues surrounding polygraph use in court. A close reading of *Scheffer* limits the impact of the case to its specific facts. Justice Kennedy left the issue open for future consideration due to the "continuing, good faith disagreements among experts and courts" and because they regarded foreclosure of such consideration as unwise. *Id* at 318-20. Also, by virtue of his dissent, Justice Stevens believes now that the Sixth Amendment should bind all court systems in the country on this issue. *See Scheffer* at 320-339 (Stevens, J., dissenting). Justice Kennedy, in an opinion joined by Justices O'Connor, Ginsburg and Breyer stated:

> Though the considerable discretion given to the trial court in admitting or excluding scientific evidence is not a constitutional mandate, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*,

509 U.S. 579, 587, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), there is some tension between that rule and our holding today.

Id at 318.

Only parts I, II-A and II-D constitute the opinion of the Court as written by Justice Thomas, joined by Justice Scalia, Justice Rhenquist and Justice Souter. In Part II-A of the opinion, the Court essentially conducts a general acceptance test. By arguing that the reliability of polygraph evidence has not yet been agreed upon in the scientific community, instead of arguing that it is unreliable, the opinion of the Court embraces the "general acceptance" test of *Frye* that was overruled by *Daubert*. In addition, none of the opinions of the nine justices reached the conclusion that polygraph evidence is, in fact, unreliable or irrelevant. Further, the Polyscore program used in the instant case, is a post *Scheffer* development and the expert in this case was not before the Court.

While *Scheffer* stood for the proposition that the President could adopt a rule of evidence barring polygraphs, that bar must be adopted pursuant to Art. 36. (10 U.S.C. § 836). Art. 36 is the governing statute which authorizes the President to promulgate evidentiary rules based on the evidence and procedures used in federal district courts.

M.R.E. 707 has no counterpart in either the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Moreover, to the extent that the use of the polygraph plays a special role in the military establishment, military practices are more favorable to a rule of admissibility than is the less structured use in the civilian sector of our society. The military carefully regulates the administration of polygraph tests to ensure reliable results. Specifically, the military maintains very

stringent standards for polygraph examiners and has even established its own Polygraph Institute, which is generally considered to be the best training facility for polygraph examiners in the United States.

The stated reasons for the adoption of M.R.E. 707 do not rely on any special military concern. The drafters merely invoke three interests: (1) the interest in excluding unreliable evidence; (2) the interest in protecting the trier of fact from being misled by an assumption that the polygraph has "an aura of near infallibility;" and (3) the interest in avoiding collateral debates about the admissibility of particular test results.

The first stated reason for adoption of M.R.E. 707 is the interest in excluding unreliable evidence. The *Scheffer* Court never concluded that polygraph evidence was unreliable. As the dissent in *Scheffer* points out, "there are a host of studies that place the reliability of polygraph tests at 85% to 90%." *Scheffer*, 523 U.S. at 333.

Studies cited by the Court's decision in *Scheffer* are outdated or involve inadequately trained examiners. The majority in *Scheffer* cited studies almost twenty years old that also cover polygraphers lacking modern professional qualifications. *See*, *Scheffer*, 523 U.S. at 310. Recent comprehensive reviews reported that accuracy rates were much higher for studies which most resembled realistic polygraph practice. *See* John E. Kircher, et al., *Meta-Analysis of Mock Crime Studies of the Control Question Polygraph Technique*, 12 L. & Hum. Behav. 79 (1988); see also David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 Utah L. Rev. 29, 72 (1986) ("existing literature suggests an accuracy of 90% or higher when examinations are conducted to assess the credibility of suspects in criminal investigations."); 1 McCormick on Evidence § 206 at 909-

11 (John William Strong ed., 4th ed. 1992) and sources cited therein. Ironically, the evidence shows that, for many years, polygraph evidence may be more trustworthy than handwriting analysis, eyewitness testimony and, in some cases, even fingerprint identifications. Widacki and Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 J. Forensic Sciences 596, 596-600 (1978).

One criticism of the polygraph is that the examiner is often poorly trained. In the instant case, however, the polygrapher was licensed by the State of Mississippi and is an active member of the American Polygraphers Association, a national regulatory body of polygraphers. A second criticism is that the examiner must interpret the results of the polygraph machine. *Scheffer*, 523 U.S. at 333-34. Allen conducts a hand score independent of the Polyscore software. The Polyscore program produces an objective computer scored test as well. A third criticism is that the polygraph machine can be "defeated." *Henseler, supra* note 104, at 1281-83. Notably, the book used by the United States in *Scheffer* for this proposition[5] states that those who do the examination "by the book" will very likely catch the examinee trying to deceive them. *Scheffer*, 523 U.S. at 335 n.25 (Stevens, J., dissenting). The dissent in *Scheffer* wisely points out that:

---

[5]See *Brief for Petitioner at 25, United States v. Scheffer, 523 U.S. 303* (citing V. Kalashnikov, *Beat the Box: The Insider's Guide to Outwitting the Lie Detector* (1986)).

> Questions about the examiner's integrity, independence, choice of questions, or training in the detection of deliberate attempts to provoke misleading physiological responses may justify exclusion of specific evidence. But such questions are properly addressed in adversary proceedings; they fall short of justifying a blanket exclusion of this type of expert testimony.

Id at 333-34

The main point is that the *Scheffer* Court reached the opinion that polygraph evidence was unreliable. In 1994, after the polygraph was administered to Scheffer, properly conducted exams conducted by properly trained examiners using modern technology and approaches, yielded results that were reliable to around 95% for detecting guilty subjects. *See United States v. Galbreth*, 908 F. Supp. 877, 886 (D.N.M. 1995).

The second stated reason for adoption of M.R.E. 707 purports to protect the trier of fact from being misled by an assumption that the polygraph has "an aura of near infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). This concern, as it relates to "preserving the jury's core function of making credibility determinations in criminal trials," was not embraced by a majority of the *Scheffer* Court, *Scheffer*, 523 U.S. at 312-313. To a large extent, this argument has been superceded by M.R.E. 704.

Additionally, the argument of the plurality in *Scheffer* noted that "[u]nlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth." *Id.* at 313.

With the inception of Polyscore and other computerized techniques there is now a reliable and definitive scientific check to confirm or contest the examiner's opinion.

The third stated reason for adoption of M.R.E. 707 is the interest in avoiding collateral debates about the admissibility of particular test results. The flaw in this argument is that if this proposition were true, anytime that an evidentiary matter called for extra attention to determine its admissibility, a *per se* rule of exclusion could be justified. That is, any evidence that would need to be subjected to a *Daubert* analysis could be subject to a *per se* rule of exclusion since this "collateral litigation prolongs criminal trials and threatens to distract the jury from its central function of determining guilt or innocence." *Id at 314*. Importantly, a majority of the *Scheffer* Court was not convinced as it relates to "avoiding litigation over issues other than guilt or innocence of the accused." *Id* at 337.

As Justice Stevens pointed out in his dissent, the President is empowered to promulgate rules, "if there are military concerns that warrant a special rule for military tribunals." *Id* at 323. Here there is no special military concern. The stated reasons for the adoption of M.R.E. 707 are all found in the Analysis of the Military Rules of Evidence in the Rules for Courts Martial at A22-50-51. Again, these reasons do not rely on any special military concern.

In promulgating this rule, the President did not follow the proper rule making provisions. The Manual for Courts-Martial has been dubbed the "Bible" by the Court of Military Appeals. Gregory E. Maggs, Judicial Review of the Manual for Courts Martial, 160 Mil. L. Rev. 96, 97 (1999). *Scheffer* is a telling case for the importance of these rules. This Court overturned the decision of the Court of Appeals for the Armed Forces and upheld a Rule

promulgated by the President. The Court noted the "broad latitude" that the rule makers have to make rules, even though those rules excluded evidence, so long as the rules were not "arbitrary" or disproportionate to the purposes they are designed to serve." *Scheffer* at 1264. Had the rule been allowed to admit polygraph evidence, the *Scheffer* Court would probably have upheld that rule as well. The dissent noted that the rule was a violation of Article 36(a) in that it was not consistent with the Federal Rules, and there was no special military concern that justified a different rule. *Id.* at 1271-72 (Stevens, J., dissenting).

The Manual for Courts-Martial (MCM) should consist of the best possible rules that can be adopted, carefully arrived at through a process that aspires public confidence by its openness and by the assurance that all relevant viewpoints are effectively heard and considered. The process used for adopting the rules must have fundamental integrity and be uniformly viewed as appropriate and fair. "Regrettably, despite small changes to improve the process, the rule making process has for many years been subjected to criticism for falling well short of this standard." Kevin J. Barry, *Modernizing the MCM Rulemaking Process*, 165 Mil. L. Rev. 237, 243 (2000). Instead, the rulemaking is not subjected to an open and public rule-making process, before a balanced rule-making committee. The American Bar Association has found aspects of the MCM rulemaking process to be "less than satisfactory ... to allow for meaningful review and comment." *Id.* at 260. The Department of Defense has failed on occasion to publish and file directives related to the Manual for Courts-Martial in the Federal Register. *Id.* Proposed amendments that would bring the rule making process into harmony with Administrative Procedure Act (APA)/Federal Register type rulemaking

were canceled from consideration by the Standing Committee on Armed Forces Law (SCAFL). *Id.* at 263. Even the records of the Joint Service Committee related to consideration and establishment of the Military Rules of Evidence remain withheld from public disclosure under the Freedom of Information Act after they met in secret for months. *Id.* at 248.

Thus M.R.E. 707 is not consistent with the Presidential authority delegated by Congress by Art. 36.

Notably, the polygraph used in the instant case is much more technologically advanced than the polygraph used in the *Scheffer* case. The old analog machine with the scratchy pens is now a thing of the past. Instead the polygraph has been computerized and digitalized. In the instant case, the operator employed a new and highly advanced technological software program developed by Johns Hopkins University called Polyscore 4.0. This software conducts objective scoring in addition to the polygrapher's hand score. It is also the official software for DOD Polygraph Institute. It was not in existence in 1992 at the time of the test that was the subject of *Scheffer*.

New technology, such as the Polyscore technique, should be tested for admissibility under *Daubert*. As Justice Kennedy, on behalf of the plurality, wrote, "I doubt, though, that the rule of exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does." *Scheffer, supra* at 318. For the above stated reasons and analysis, the present case fulfills the prophetic prediction of Justice Kennedy. It demonstrates why the rule of exclusion cannot stand. The facts, law and technological advances present the compelling case for the introduction of this expert testimony. Credibility and honesty were issues at the heart of the trial. The introduction of the

polygraph evidence may well have changed the outcome.

II The Accused Was Denied His Constitutional Right to Prepare and Present a Defense as Well as His Statutory Rights to Equal Access to Witnesses Pursuant to Art. 46 and 49 of the Uniform Code of Military Justice.

In *Rompilla v. Beard*, 545 U.S. ____, 125 S.Ct. 2456 (2005), this Court reaffirmed its earlier holding in *Wiggins v. Smith*, 539 U.S. 510 (2003). The *Rompilla* court specifically found that defense counsel had a duty to conduct a proper investigation and to prepare for trial. Pretrial investigation is essential to the effective assistance of counsel. Defense counsel must engage in a reasonable amount of pretrial investigation and "at a minimum ... interview potential witnesses and ... make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir.1985). Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel. *See Wiggins v. Smith*, 539 U.S. at 521; *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

A review of this issue is important because the rights of the defense to investigate the case and prepare a defense are murky at best in the military system. Although promised equal access to witnesses and evidence, the government controls the funding for both expert witnesses and fact witnesses. Without government approval the defense cannot hire an expert or fund travel. The defense team, unlike the federal and most state systems, has no subpoena power. Any evidence obtained by subpoena is at the discretion of the Trial Counsel. All evidence is returnable to the Trial Counsel who gets the first look at the evidence and

forwards it to the defense at its leisure. In order to secure witnesses for trial, the defense must proffer to the Trial Counsel, a summary of the intended testimony. This gives the government a pre-trial look at the defense case. The government does not share the contents of its subpoenas with the defense and it does not have to make a proffer of testimony to the defense. The effect is to chill the defense investigation or at the very least to delay it and limit its effectiveness. Although Articles 46 and 49 were enacted to serve as a break on abuse by the convening authority and the Trial Counsel in their prosecutorial roles, the plain language of these statutes are widely ignored by the government and the military courts. The instant case is a vivid example of governmental abuse of an accused's constitutional and statutory rights.

The defense hired an investigator to assist in the investigation but were immediately stymied by the Navy. Interference by the government with the defense's attempt to interview witnesses was improper. *United States v. Washington*, 42 M.J. 547, 556 (A.F. Ct. Crm. App. 1995). Here the government placed large portions of the base off limits to the defense counsel and his investigator who were properly performing their duties. As a result, the defense could not complete their investigation.[6]

Investigator Lord testified that he was working under restrictions that he never encountered working as an NCIS agent at the same base. Additionally he opined that the effect of the attempted intimidation had chilled

---

[6] Defense counsel is a retired Navy Surface Warfare Commander. His investigator was not only a retired NCIS agent but also a retried Army Reserve Military Police Lieutenant Colonel.

his investigation. The Commanding Officer's threat of ejection and even arrest constituted an illegal, improper and unprofessional admonishment and was a violation of the unlawful command influence statute. There was no indication that the government or NCIS were forced to undergo comparable constraints or that they were the subject of similar restrictions. NCIS Special Agent Beasley noted in her deposition that she had free access to go to the barracks and interview whoever she wanted.

Interference with an accused's access to witnesses is also a form of unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A.1994). Command representatives contacted Mr. Lord and obstructed his movements. This command influence impaired the defense investigation. Mr. Lord stated that he was intimidated and felt forced to curtail his investigation. He even described the effect as "chilling." This violation of Article 37 acted to impair the investigation. Additionally, since similar constraints were not placed upon NCIS and the government counsel, it was obvious that the defense was being deprived of "equal" access to witnesses and evidence in violation of Art. 46. Here the command's actions are not only unfair but the unfairness flows directly from the command influence.

The actions of the Commanding Officer were in direct violation of Article 46 and Article 37. These actions were designed to impair the accused's right to prepare a quality defense pursuant to his Fifth and Sixth Amendment rights.

Command influence is "the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987). It is prohibited by Art. 37 of the U.C.M.J. Notably that statute precludes any commanding officer from

interfering with the defense counsel's exercise of his functions. The Staff Judge Advocate carries the mantle of command for his commanding officer. The intimidation of Mr. Lord is a direct form of unlawful command influence.

The complaining witness previously testified that she never filed a police report outside of this case. Actually she had previously made a false complaint of sexual abuse against her father. This was highly relevant evidence that goes directly to the credibility of the complaining witness. By refusing to fund travel to Houston to further investigate this matter, the Trial Counsel, convening authority and Military Judge successfully cut off this valuable lead. The accused was convicted of conspiracy to make a false official statement as well as conduct unbecoming an officer. This implies that the trier of fact believed some part of the complaining witness' story. The additional evidence was critical to proving that the complaining witness' story was incredible.

Nor can it be said that M.R.E. 412 would bar the evidence. M.R.E 412 is not applicable. The drafters comments note that the rule does not apply to false complaints. When the witness lies, the information is admissible. *United States v. Bartlett*, 794 F.2d 1285, 1292 (8th Cir. 1986).

The accused initially requested NCIS to conduct certain investigations in the present case. Trial Counsel denied Defense requests for NCIS to conduct an investigation. Defense brought a motion to fund an investigator. The Military Judge denied this funding. Subsequently, LT House requested his Individual Military Counsel be sent to investigate the matter. The defense accounting data request for travel was denied. The failure to adequately fund defense counsel travel for

case preparation violates the accused's right to equal access to witnesses and evidence under Article 46, and R.C.M. 701(e) and the accused's right to counsel under the Sixth Amendment of the United States Constitution. This action prejudiced the trial strategy, materially affecting the presentation of the defense's case. See *United States v. Adens*, 56 M.J. 724 (Army Crt. Crm. Appl. 2002).

The equal opportunity to obtain evidence under Art. 46 and Rules for Court Martial, "is a 'substantial right' of a military accused . . . independent of due process discovery rights provided by the Constitution." *Adens* 56 M.J. at 726. Credible evidence of a prior false complaint by the complaining witness existed and the Military Judge's failure to order funding constituted clear and prejudicial error. This violated the Sixth Amendment's guarantee of the right to counsel United States v. MacCulloch, 40 M.J. 236, 238 (CMA 1994). A military accused is entitled to the effective assistance of counsel during pretrial stages as well as during proceedings on the merits. *United States v. Rivas*, 3 M.J. 282 (CMA 1977). The accused did not have an appropriated funds budget that would allow counsel to travel on behalf of LT House. The trial counsel and the convening authority, on the other hand, controls the purse strings and is in a unique position to hamper the defense.

The government's failure to provide funding materially prejudiced petitioner's right under Article 46, UCMJ to have equal access to the evidence.

Professional advocacy may be aggressive, but the government lost its focus and forgot that "[a]s a representative of a sovereign, a prosecutor's duty is not to win a case, but to ensure that justice is done." *United States v. Williams*, 47 M.J. 621, 625 (Army Ct. Crim.App. 1997), *aff'd*, 50 M.J. 436 (1999). "[The purpose of a

criminal trial is truthfinding within constitutional, codal, Manual and ethical considerations." *United States v. Romano*, 46 M.J. 269, 274 (1997). Counsel must be always mindful that the Rules for Professional Conduct apply to Navy courts-martial and that gamesmanship via concealment of evidence, obstructive tactics in discovery and investigation has no place in Navy courts-martial. *See, Adens*, 56 M.J. at 735.

Although the Military Judge did not bar false complaint evidence his rulings in denying the defense access to an investigator and refusing to allow funding for defense counsel to travel to Houston had the same effect. It prevented the defense from developing this crucial lead which could easily have been the final nail in the complaining witnesses' credibility coffin.

Nor was the defense allowed to question the complaining witness or depose her pursuant to Art. 49. The defense proffered the need to interview Allen on matters concerning DNA and a potential false complaint of sexual molestation. The complaining witness refused to talk with the defense. In the alternative the defense requested a deposition pursuant to Art. 49. The Investigating Officer denied the request.

Once charges have been preferred, a party has an absolute right to depose a witness unless the Military Judge forbids it for good cause. 10 U.S.C. § 849. When there is some reason to believe that the witnesses have knowledge relevant to the criminal charges and they refuse to talk to defense counsel, "good cause" to forbid the deposition is lacking. *United Sates v. Killebrew*, 9 M.J. 154, 161 (C.M.A. 1980).

The defense has an unconditional right to talk with witnesses pursuant to Article 46, U.C.M.J. and R.C.M. 703. *United States v. Garries, supra.*. The authority to obtain witnesses is codified in Art. 46 and R.C.M. 703(b).

Here the government had *ex parte* access to the complaining witness, Witness Allen. Witness Allen would not talk to the defense counsel but she provided a sworn statement to NCIS and talked with Trial Counsel on a routine basis. As indicated *supra*, additional information has come to light since then. Thus the denial of the deposition was clear error.

Additionally, it should be noted that the complaining witness had previously agreed to talk to the defense. After a consultation with the Executive Officer of the Trial Service Office, immediately prior to the Art. 32, she reversed herself and stated that she would no longer voluntarily talk with defense counsel.

The Sixth Amendment guarantees service members the right of compulsory process and confrontation. Allowing compulsory process without pre-trial access makes that Constitutional right an absolute nullity. *Wisniewski v State*, 1 Storey (51 Del) 84, 138 A.2d 333, 338 (1957). Additionally, any interference with access to witnesses or evidence constitutes unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 212-213 (C.M.A.1994).

In the federal system, any actions of federal prosecutors that have the purpose or the effect of discouraging witnesses from cooperation are improper. *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978). Both prosecution and defense should have the same rights of access to witnesses. *Id.* Prosecutorial interference with witnesses results in the denial of a fair trial. *United States v. Gregory*, 392 F.2d 185 (D.C. Cir. 1966). *But see, United States v. Black*, 767 F.2d 1334 (9th Cir. 1985).

The military system envisions an even more liberal discovery process than the federal criminal system. Relying on Article 46 and the historical liberal discovery,

the military's highest court has ruled that while witnesses cannot be forced to talk to the defense, their testimony should be suppressed at trial if they refuse a private interview with the defense. *United States v. Enloe*, 35 C.M.R. 228, 235. 15 USCMA 256, 263 (CMA 1965). This theory has also been laid to rest in the state courts. *State v Papa*, 32 RI 453, 80 A 12, 15 (1911). *See, also, Commonwealth v Balliro*, 209 N.E.2d 308, 315 (Mass) (1965).

The *Enloe* court conducted a careful analysis of state and federal law in rendering their decision. *Enloe*, 35 C.M.R. 232-34. The bottom line is that equal access means what it says and while no witness can be forced to grant an interview, the refusal results in suppression.

As long as the government can restrict and review the defense investigation, a military accused will be denied his constitutional right to prepare a defense and his statutory right of equal access to witness and evidence.

Here the decision of the Court of Appeals for the Armed Forces to deny relief is in contrast to the decisions of this Court, its own precedent and the other federal Courts of Appeal and State courts of last resort cited herein. Consequently, this Court should grant certiorari to resolve the important issues of law.

III The Military Judge's Denial of Evidence Under M.R.E. 412 Acted to Deprive the Accused of His Constitutional Rights Under the Fifth and Sixth Amendments to the Constitution.

The military rape shield rule is not an absolute privilege. *United States v. Colon-Angueira*, 16 M.J. 20, 24 (C.M.A.1983). The rule does not apply when admission of

the evidence is constitutionally required. *United States v. Knox*, 41 M.J. 28, 30 (C.M.A.1994). Evidence is constitutionally required to be admitted when it is relevant, material, and favorable to the defense's theory of the case. *United States v. Dorsey*, 16 M.J. 1, 4 (C.M.A.1983). Here the courts-martial applied the rape shield rule too strictly and deprived the accused of his constitutional right to present a defense.

MRE 412 protects victims of sexual assaults against needless embarrassing and degrading cross-examination, and unwarranted invasions of privacy. The rule is also designed to encourage the reporting and prosecution of sexual offenses. Admitting this evidence would not discourage reporting or cause the complaining witness undue embarrassment. The evidence was relevant, material and favorable to the defense's theory of the case.

Here the forensic tests showed that the panties worn by the complaining witness contained the semen of another person not involved in the alleged rape. The semen evidence goes directly to the credibility of the complaining witness. *Bartlett supra.* There was no fourth person involved in the complaining witness' recitation of the events. No fourth person should have been able to donate semen. This was strong evidence of fabrication. Evidence of fabrication is both material and relevant. Introduction of semen evidence was certainly favorable to the defense. The introduction of this evidence was constitutionally required.

The defense had a constitutional right to impeach via cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Impeachment based on prior statements is proper pursuant to M.R.E. 613. Impeachment to show a motive to fabricate was admissible under M.R.E.608. Here credibility was central to the few convictions in the

case. The semen on the panties showed that it was someone other than the accused who had sex that evening.

The issue of whether semen stains would survive laundering was considered by the Military Judge. Some witnesses said washing would remove the stain. Some said it would not. The government's expert testified both ways. The conflicting testimony as to the effect of laundering the panties, goes to the weight of the evidence and not its admissibility. Additionally, the government expert has now been suspended for fabricating results and reports.

The government also successfully moved to suppress the complaining witness' website information. Allen had a number of webpages on the world wide web. The web pages titled "CherryCreme21" and "PecanPie21" included personal information about the complaining witness that gave the defense information to question her veracity. The defense did not intend to introduce the websites to show sexual conduct or sexual proclivity. The websites are sexually benign on their face. Suppression of the websites deprived the defense of its right to impeach the complaining witness pursuant to *Davis v. Alaska, supra.* The complaining witness lied under oath. She should have had to live with this indiscretion at trial. Given the fact that the only convictions were based on conflicting testimony between the complaining witness and the accused, exclusion of this vital impeachment evidence was significant error prejudicial to the accused. The Court of Appeals for the Armed Forces erred in not rejecting the actions of the Military Judge. They should have granted the writ and remanded the matter for a rehearing. By failing to do so, they ignored the precedents of this Court and various federal Circuits as delineated herein. Consequently, this Court should grant

the petition for certiorari.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Armed Forces.

Respectfully
Submitted,

John B. Wells
Counsel of Record
317 Portsmouth Drive
Slidell, LA 70460-8469
985-641-1855

USCA Misc. Dkt. No. 05-8044/NA
Crim. App. Dkt. No.200300855

United States Court of Appeals
for the Armed Forces
Washington, D. C. 20442-001

UNITED STATES,

Appellee

v.

ROGER A. HOUSE

Appellant

O R D E R

On consideration of THE WRIT-APPEAL PETITION, IT IS, BY THE Court, this 12th day of December, 2005,

ORDERED:

That said petition is hereby denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Appellant (WELLS, Esq.)
Counsel; for Appellee (CRASS)

NMCCA No. 200300855

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

ROGER A. HOUSE
Lieutenant (O-3)
U. S. Navy (Retired)
Petitioner

v.

Judge Advocate General of the Navy

and

United States
Respondents

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND PETITION FOR REVIEW UNDER ARTICLE 69(D), UCMJ

Upon consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Petition for Review Under Article 69(d), UCMJ, filed on 27 July 2005, the respondents' Answer to Court Order to Show Cause and Motion to Dismiss for Lack of Jurisdiction, filed on 9 August 2005, and the petitioner's reply, filed on 16 August 2005. In which he requests oral argument, it is by the Court, this 18th day of August 2005,

ORDERED:

1 That the petitioner's request for oral argument is denied.

2 That, without deciding the respondent's Motion to Dismiss for Lack of Jurisdiction, the Petition for Extraordinary Relief and Petition for Review Under Article 69(d), UCMJ, are denied.

For the Court

R. H. TROIDL
Clerk of Court
18 August 2005

Copy to:
NMCCA (71)
Mr. Wells (Fax (985) 649-1536)
45
46 (LT Mark HERRINGTON)
02

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

IN REPLY REFER TO

5814
Ser. 40.2/0302
December 13, 2004

IN THE OFFICE OF THE
JUDGE ADVOCATE GENERAL OF THE NAVY

NMCMR NO. 200300855
MJR NO. 69A-03-035

UNITED STATES

v

ROGER A. HOUSE
LIEUTENANT (O-3)

MEDICAL SERVICE CORPS
UNITED STATES NAVY

Examination pursuant to Article 69(a), UCMJ, of the general court-martial convened by Commander, Navy Recruiting Command, Millington, Tennessee
Sentence adjudged: 31 January 2002

The record of trial in the foregoing case has been examined in accordance wit Article 69(a), Uniform Code of Military Justice, 10 U.S.C. § 869(a). The accused's conviction to Specification 2 of Additional Charge II is unsupported in law and is set aside. The sentence is accordingly reassessed, but no modification of the sentence is warranted given the seriousness of the remaining offenses of which the accused was found guilty.

Even if no error had occurred at trial, the sentence would have been at least of the same magnitude as the sentence adjudged. *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). No other part of the findings or sentence is found to be unsupported in law. And further reassessment of the sentence is not appropriate.

J. E. McPherson
Rear Admiral. JAGC, U. S. Navy
Judge Advocate General

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U. S. Constitution, Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just
compensation.

U. S. Constitution, Amendment VI. Jury trials for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

10 U.S.C. § 832. Art. 32 U.C.M.J. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in > section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for

further cross-examination and to offer any new evidence in his own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused--

(1) is present at the investigation;

(2) is informed of the nature of each uncharged offense investigated; and

(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

10 U.S.C. § 836. Art. 36 U.C.M.J. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

10 U.S.C. § 837. Art. 37 U.C.M.J. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give

a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

10 U.S.C. § 846. Art. 46 U.C.M.J. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

10 U.S.C. § 849. Art. 49 U.C.M.J. Depositions

(a) At any time after charges have been signed as provided in section 830 of this title (article 30), any party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the

deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears--

(1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.

(f) Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the

court-martial.

10 U.S.C. § 869. Art. 69 U.C.M.J. 69. Review in the office of the Judge Advocate General

(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.

(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.

(c) If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order

a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

(d) A Court of Criminal Appeals may review, under section 866 of this title (article 66)--

(1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the Judge Advocate General; and

(2) any action taken by the Judge Advocate General under this section in such case.

(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under this section, the Court may take action only with respect to matters of law.

Military Rule of Evidence 412. Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition

(a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen,

injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must --

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to

offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Military Rule of Evidence Rule 707. Polygraph Examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Rule for Court-Martial 701. Discovery

(a) Disclosure by the trial counsel. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following

information or matters to the defense --

(1) Papers accompanying charges; convening orders; statements. As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) Documents, tangible objects, reports. After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(3) Witnesses. Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

(4) Prior convictions of accused offered on the merits. Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) Information to be offered at sentencing. Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) Evidence favorable to the defense. The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

(b) Disclosure by the defense. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel --

(1) Names of witnesses and statements.

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call

at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

(2) Notice of certain defenses. The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in

question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

(3) Documents and tangible objects. If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) Reports of examination and tests. If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the defense that the defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) Inadmissibility of withdrawn defense. If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

(c) Failure to call witness. The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) Continuing duty to disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) Access to witnesses and evidence. Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

(f) Information not subject to disclosure. Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) Regulation of discovery.

(1) Time, place, and manner. The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) Protective and modifying orders. Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in

whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) Failure to comply. If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

(h) Inspect. As used in this rule "inspect" includes the right to photograph and copy.

Rule for Court-Martial 702. Depositions

(a) In general. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

(b) Who may order. A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

(c) Request to take deposition.

(1) Submission of request. At any time after charges have been preferred, any party may request in writing that a deposition be taken.

(2) Contents of request. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined;

(C) A statement of the reasons for taking the deposition; and

(D) Whether an oral or written deposition is requested.

(3) Action on request.

(A) In general. A request for a deposition may be denied only for good cause.

(B) Written deposition. A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

(C) Notification of decision. The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(D) Waiver. Failure to review before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

(d) Action when request is approved.

(1) Detail of deposition officer. When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

(2) Assignment of counsel. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

(3) Instructions. The convening authority may give instructions not inconsistent with this rule to the deposition officer.

(e) Notice. The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(f) Duties of the deposition officer. In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

(g) Procedure.

(1) Oral depositions.

(A) Rights of accused. At an oral deposition, the accused shall have the rights to:

(i) Be present except when: (a) the accused, absent good cause shown, fails to appear after notice of time and place of the deposition; (b) the accused is disruptive within the meaning of R.C.M. 804(b)(2); or (c) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in R.C.M. 506.

(B) Examination of witnesses. Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-

examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

(2) Written depositions.

(A) Rights of accused. The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial.

(B) Presence of parties. No party has a right to be present at a written deposition.

(C) Submission of interrogatories to opponent. The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

(D) Examination of witnesses. The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(3) How recorded. In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

(h) Objections.

(1) In general. A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition waives such objection.

(2) Oral depositions. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

(3) Written depositions. Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is waived. Objections to answers in a written deposition may be made at trial.

(i) Deposition by agreement not precluded.

(1) Taking deposition. Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) Use of deposition. Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the

parties unless the military judge forbids its use for good cause.

Rule for Court-Martial 703. Production of witnesses and evidence

(a) In general. The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) Unavailable witness. Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.